



## **SUPERIOR COURT OF THE STATE OF ARIZONA IN AND FOR MARICOPA COUNTY**

**Gary E. Donahoe**  
**Judge**  
**101 W. Jefferson, Suite 912**  
**Phoenix, AZ 85003**

**Office: (602) 506-3712**  
**Fax: (602) 506-7867**

March 10, 2006

Hon. Michael Ryan  
Justice, Arizona Supreme Court  
c/o Clerk of the Arizona Supreme Court  
1501 W. Washington, Suite 402  
Phoenix, AZ 85007

Re: Keeping the Record Final Report

Dear Justice Ryan,

I have reviewed the Committee's final report and disagree with the proposed rule and statutory amendments. In my opinion, the minority report by Judge Mundell is the correct position. I see no justification for not allowing the court record to be made electronically in all case types.

The court in all cases needs a record that it owns and controls, is accessible by more than one person, is reliable and is verifiable. Electronic recording meets those standards. There is no logical or supportable reason why those standards fulfilled by electronic recording should not apply to criminal cases. When the record is kept by a court reporter, the record is owned by the court reporter and is accessible only by that court reporter. No one else can read the reporter's notes. In most instances, there is a fee that must be paid by anyone wanting a transcript of that record. After production of a transcript, there is no way to verify the accuracy of the notes or the transcription.

A digitally recorded record is immediately accessible by all involved in the proceeding. I recall one criminal case where the jury requested that the testimony of a witness be read back. If I had been using only a court reporter, the jury would have had to have waited a day or more while the court reporter transcribed

the testimony. Because the trial had been recorded using the JAVS audio-video system, I seated the jury back in the courtroom with the parties present, put the CD in my laptop computer and the testimony was replayed on the courtroom monitors. Granted, a transcript of the testimony could have been prepared and read back to the jury in a day or so. However, that reading would have deprived the jury of the ability to view the witness' demeanor while testifying and would have incurred additional costs to the court and public.

There is a distinction between capturing the record and transcribing the captured record. Having been in one of the Maricopa County Superior Court's electronic courtrooms on a civil calendar for over two years, my experience was that the electronic recording system was reliable and accurately captured the proceedings. Therefore, I do not believe that anyone can legitimately contend that the current electronic systems such as JAVS, FTR and Exhibit One do not do an excellent job of capturing the record. In my opinion, the issue is not using technology to capture the record, but transcription of the electronic recording. I agree that there should be some standards set to ensure the accuracy of the transcription. Importantly though, unlike a transcript prepared by a court reporter from that reporter's notes, the accuracy of a transcript of an electronically recorded event can be checked against the recording. I have done that in the past to verify the accuracy of the transcription service utilized by the Maricopa County Superior Court by simply listening to the recording while reading the transcript.

There are significant benefits of electronic recording to the parties and the court. The judicial officer has immediate access to the record. Repetitive motion injuries to court reporters are reduced or eliminated. Court reporter resources can be better allocated. Significant cost savings to the public can be achieved and, as stewards of the public money, those cost savings cannot be ignored. The parties can obtain copies of the CD or videotape the same day that the recording is made without incurring the substantial cost of a transcript billed at a "daily," "expedited" or "overnight" rate thus making the court system more accessible to those with limited financial resources. Those benefits should be available to those involved in criminal cases as well as all other case types.

I am not surprised by the court reporters' stance about courtroom technology, but it is a stance that is not supportable. On those occasions when a court reporter was requested and present while I was in an e-courtroom, the court reporter almost

always requested a copy of the CD of each day's proceedings. I assumed that the court reporter was going to use the CD to verify the accuracy of the transcript. I have also noticed that many court reporters utilize tape recorders in addition to taking stenographic notes. The claim that the electronic recording technology is unreliable in capturing the record is contradicted by the court reporters' own reliance on the courtroom technology and their use of tape recorders.

I suggest that A.R.S. § 38-424 be amended as follows:

38-424. Use of tape recorders or other recording devices; exception

This state or any agency of this state, including the judiciary, and each political subdivision of this state, including any courts of law, may for any purpose use tape recorders or other recording devices in lieu of reporters or stenographers. ~~This section does not apply if~~ If the matter to be recorded arises out of court proceedings and the court is not equipped with an electronic recording system and transcription method approved by the Arizona Supreme Court, ~~and either party requests that a court reporter or stenographer~~ shall be used.

I believe that the method of capturing the record should be left to the discretion of the judicial officer hearing the matter. The judicial officer can consider the available resources, the nature of the case and the desires of the parties. I also believe that electronic recording is entirely appropriate in criminal cases for the reasons stated above.

If the final proposal is not to include criminal cases, then I suggest that at least a demonstration project be undertaken to test the use of courtroom technology in capturing the record in criminal cases. I have included a proposed administrative order to set such a project in place. (I note that this proposal has not been approved or endorsed by anyone on the court.)

Transition is difficult. Technology is directly impacting the court reporters' interests. The court reporters' reaction is understandable. I think that in five years, court officials looking back on this debate will wonder what the fuss was about. In my opinion, capturing the record in any way other than electronically will be the exception. Courts will be using even better technology than today's systems to make the court record in all case types and wondering why folks were so reluctant to use the excellent technology that is now available.

Page Four  
KTR Comment

I urge the Court to adopt Judge Mundell's minority report.  
Sincerely,

Gary E. Donahoe